UNIVERSITY OF TORONTO
FACULTY OF LAW

PROPERTY LAW: FALL TERM 2018

VOLUME TWO
CHAPTERS 8 – 11

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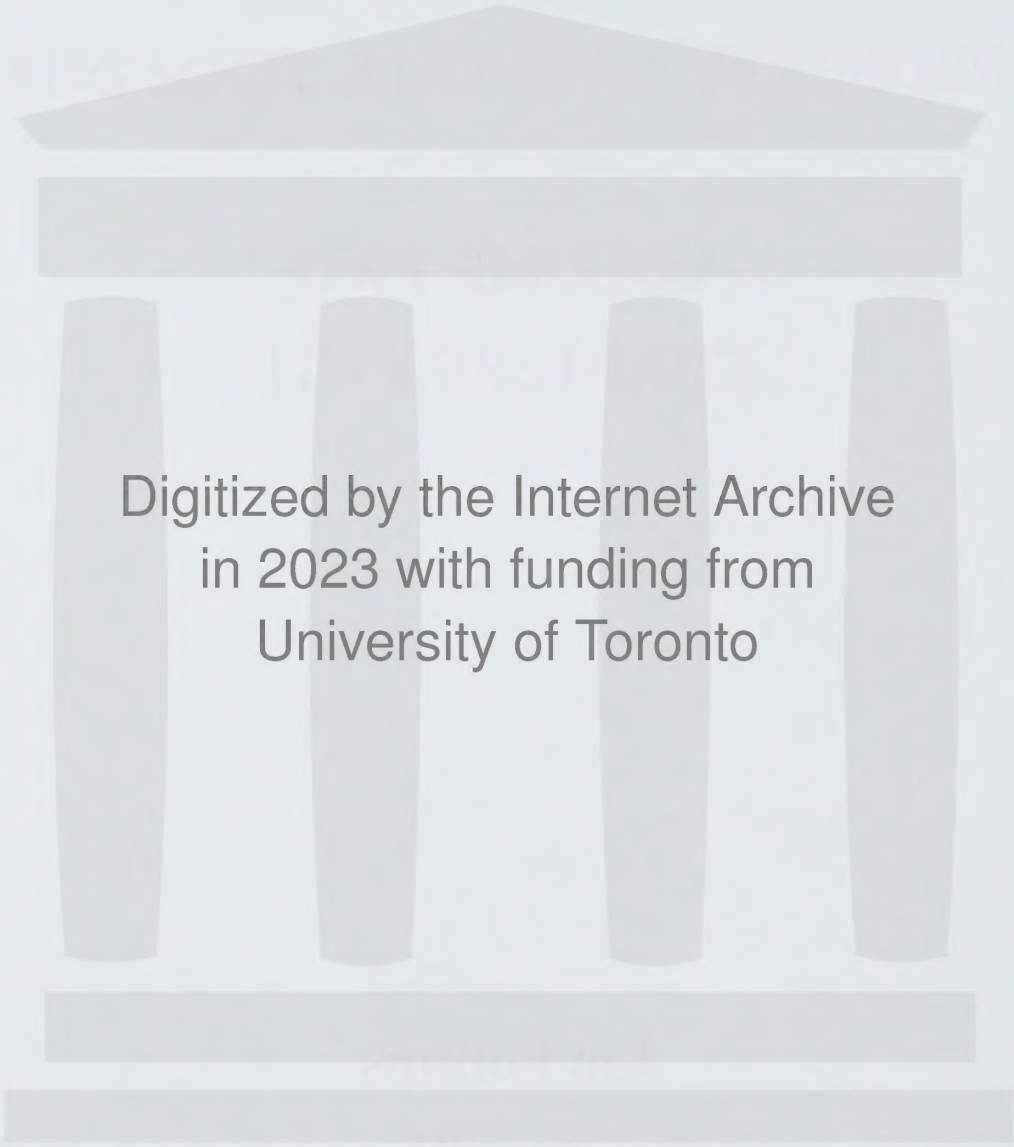

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CHAPTER 8

PROPERTY, POLITICS, THE CONSTITUTION AND THE STATE: DE FACTO EXPROPRIATION

INTRODUCTION

It is a commonplace of political philosophy that the western liberal tradition places great emphasis on the freedom of the individual. This freedom is often discussed in terms of freedom from control by others, especially the state. It is also often contended that private property serves a crucial role in protecting and enhancing such freedom. The enhancement of individual liberty is therefore often cited as a justification for private property in general. More particularly, it also serves as an argument for putting into private hands as many as possible of the strands in the bundle of rights that property represents.

Some commentators also point out that while private property gives those who have enforceable claims to resources power over their own lives, it also gives them a measure of power over the lives of others. Moreover, they argue, too great an emphasis on private property runs the risk of countering society's collective goals.

Our socio-economic system obviously balances the private and the public through taxation. We achieve collective goods by taxing, and we then go a step further and construct systems of progressive taxation – high earners pay a higher rate of tax on income about a certain threshold. This chapter is principally about another way in which we redistribute resources through state action – by regulating uses of private property. The law does this in many ways, through court rulings and through statutes. We have seen one example in chapter 4 - the debate over property rights and discrimination – and there are many others.

This chapter cannot possibly cover all the ways in which we intervene in a regime of private property, limiting the private owner's rights for the public good or for the private interests of others. It principally considers only one small area – what is known as *de facto* expropriation in Canada, and regulatory taking in the US. Accept that in all western countries it is possible for the state to take title to your property. We call this expropriation. The law has a variety of procedures for doing this, which differ from nation to nation and from sub-unit to sub-unit within nations (provinces and states). Accept also that when a western liberal state does this it must pay the person from whom property is taken some compensation. Sometimes, as in the US, this right to compensation is a constitutional right. Sometimes, as in Canada, this 'right' to compensation comes via the general political culture. It is possible for the state to decide it wants to build a new road where my house stands, and to pass a statute transferring my house to the state so that the state can demolish the house. In Canada it is also theoretically possible for the state to do this without compensating me in any way. I cannot invoke any part of our constitution to prevent this. But we all know that this would be politically impossible to get away with. The government would not be seen as acting legitimately.

Having set up this very broad background, I now have to make it clear that in this chapter we will not deal with the expropriation of title as such. The cases are about *de facto* expropriation, to distinguish what happens in them from *de jure* expropriation. We are looking at cases that tell us where the line is between mere regulation and regulation that is considered so onerous that we call it expropriation, albeit *de facto* expropriation because the state does not actually take title to my land.

The extreme example makes the point that *de facto* expropriation is possible. Imagine that Ontario passes a statute which nowhere states that it is taking title to your land. Rather the statute says that you cannot lease or sell the land to another, you cannot build on it or develop it in any way, and you cannot use it for any activity, from playing soccer to building to riding horses. You might want to argue that even though the state has not taken your title, it has rendered it useless, reduced the value to nothing, taken away all uses, and overall the statutory regulation of the land is tantamount to expropriation. It's reasonable to assume that you would win this argument. But change the facts. The statute says that you cannot lease the land, but you can sell it, that you can build a house but you can't develop it in any other way, and that you can use it for private, non-commercial activities like playing soccer and riding horses but not commercial ones like running a soccer camp or a stables. You have lost some of your rights in the land, but not as many as in the first example. So is this also tantamount to expropriation? The answer in Canada is no – many of the things mentioned are the kinds of things that are covered by land use planning legislation or zoning. We deal with this kind of thing through the political system. Not by going to court and arguing that property has been taken.

Having dealt with the two easy cases, the question which remains is, of course, where do we draw the line between de facto expropriation and 'mere regulation'? One's answer to this will often depend on one's general political outlook. We might therefore engage in some interesting discussions. A necessary prelude to those discussions, of course, is to understand what the law says. And as part of doing that we are going to compare the American and the Canadian law on the matter in the next two sections of this chapter.

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THE LINE BETWEEN REGULATION AND TAKING: THE UNITED STATES

The first two "regulatory takings" cases are from the USA. The United States Constitution contains a specific protection for property. The fifth amendment reads in part: "...nor shall any person ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation". This originally applied only to the federal government, but it was extended to the states, in part explicitly and partly by implication, by the fourteenth amendment (1868). In short, the state may take property from the citizen provided that this is done for a public purpose, such as a highway, and provided fair compensation is paid.

We are not concerned here with the intricacies of the law relating to what a public purpose is or to how compensation is calculated. The *Pennsylvania Coal* and *Keystone* cases are about whether the government has taken property at all. If it has not, no compensation need be paid. This may sound like an easy question, but the cases show that it is not. What causes the difficulty is that almost any regulation by government of any aspect of social or economic life will affect in some way the property rights of some person or persons. Anti-pollution laws, for example, limit what uses an owner can make of land and in that sense remove a strand from the owner's bundle of rights. But this is not considered a taking - or at least not generally so, for one can find, in the US, people who say that practically any regulation is a taking.

But if "all regulations are takings" is too extreme a position, it is also the case that most people would agree that the converse - regulation can never amount to a taking - is also too extreme. This position would state that the government does not "take" from the citizen unless it acquires title to land or personal property. But this would permit the state to prohibit every use, and thereby render ownership worthless, without paying compensation.

So the question in the cases is - where between these two extremes is the line to be drawn? In reading these cases do not be confused by the term "police power". It is a term of art in US constitutional law meaning the power of the states to regulate private conduct in the interests of public health, welfare and safety.

The area of regulatory takings is a large and complicated one in the US, and it is not my purpose to cover it comprehensively or indeed more than very superficially. The two cases excerpted are here for different reasons. *Pennsylvania Coal* is here because it is considered the origin of the modern, twentieth-century approach to regulatory takings, the case that signalled a more interventionist approach by the US Supreme Court. As Justice Stevens says in 1987 in *Keystone*, "[t]he two factors that the Court considered relevant [in *Pennsylvania Coal*] have become integral parts of our takings analysis. We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests, ... or denies an owner economically viable use of his land' ".

The second case, *Keystone*, is included in part because it obviously involves a revisiting of essentially the same issue that was at stake in *Pennsylvania Coal*. More importantly, it demonstrates a sharp disagreement within the US Supreme Court of the time over when the court ought to require compensation for regulation, a disagreement in large measure based upon how the two camps

decide to define "property" for these purposes. Hence the issue that we considered in chapters 1 and 2 - what do we mean by property - turns out to be crucial.

For the majority in *Keystone* the property held by the coal company is all of the coal deposits available to it. They are thus able to say that the regulation affects only a small part of the complainant's property. Conversely, the dissenting judgment defines property as each individual strand in the bundle of rights; they are thus able to say that the regulation "takes" all the property in the strand - both all of the 27 million tons of coal and all of the "support estate". There are clearly other differences between the two judgments also, especially in the emphasis each would give to the public interest.

The *Keystone* case discusses a "support estate." Pennsylvania is unique among common law jurisdictions in recognising three estates - surface, mineral, and support. It is not uncommon in common law jurisdictions to separate the first and the second, to give mineral extraction rights to a person other than the fee simple holder of the rights to the surface, but normally the first and the third go together. The holder of the right to use the surface also has the right to have it supported, and this necessarily limits any underground activity. But because, as *Pennsylvania Coal* tells you, in the nineteenth century coal operators sold land above which they were working to individuals, and because the contracts of sale included a term exempting the coal operator from any liability should the mining cause the surface to subside, the courts recognised the coal operators' interest as a "support estate." The term is a bit of a misnomer, because in holding the support estate the coal companies could choose to support or not - it is therefore in effect a right to cause the surface to subside. That is all you need to know about it, but note that it does become important because the dissenting judgment depicts the support estate as a separate interest in land that is effectively expropriated by the regulations at issue.

The *Keystone* case is not the latest word on the subject. But it is here because it demonstrates the sharp divergence between liberals and conservatives on this issue. The US Supreme Court has gone back and forth since *Keystone*, without ever resolving the fundamental tensions in the case. That may change, of course, with the appointment of Justice ??? – at the time of writing it looks like Kavanagh.

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THE LINE BETWEEN REGULATION AND TAKING: CANADA

It is well known that neither Britain nor Canada has a constitutional entrenchment of property rights like the United States. Britain does not have a written constitution (as that term is usually understood) at all. The Canadian constitution prior to 1982 dealt with property, but only to assign jurisdiction over it. While there were many who proposed entrenching property rights in the *Charter of Rights*, this was not done. The *Canadian Bill of Rights* does contain a protection for property couched in wording very similar to that of the US fifth amendment, but that is not a constitutional document.

None of this means, of course, that private property is not highly valued in the political and constitutional culture of either Britain or Canada. While it is constitutionally possible for governments in either country to seize private property for any purpose and not pay compensation, actually doing so would very likely be deemed politically illegitimate. In fact, there has long been what might be termed a common law entrenchment of property rights, and the rules containing this are discussed in *Manitoba Fisheries* below. *Manitoba Fisheries* also examines the question of when regulation becomes a taking, as do the cases which follow.

Presumably because of the lack of a constitutional protection for property, the three Supreme Court of Canada cases extracted here - *Manitoba Fisheries*, *Tener*, and *Canadian Pacific Railway* - are the whole of the Court's jurisprudence on regulatory takings.

If you wish to know more about the *Manitoba Fisheries* case I have placed on QUERCUS a book chapter I wrote about the case, with Jeremy Martin, who took this course a few years ago. It is a legal history piece, of the genre generally referred to as 'legal archeology.' The purpose of legal archeology is to look at the context of a famous case, and analyse how it got to court, the background, the course of the litigation etc. I am offering this piece of legal history to you for a reason. I was asked to write about it for a collection on the background to famous Supreme Court of Canada property law cases. Once I did so I realised how little I knew about the case from the court reports, indeed that I taught it for 20 years without really appreciating what it was about! My newly-acquired knowledge also made me think about the result differently. If you wish to read the article do so after you have read the *Manitoba Fisheries* judgment. Did you think about the case differently once you knew a lot more about the background?

CHAPTER NINE - INDIGENOUS TITLE

INTRODUCTION

This chapter provides a necessarily brief introduction to the subject of indigenous (aboriginal) title to land. By the time we get to this chapter many of you will have done the general subject of aboriginal rights in constitutional law. Others will do it after we do aboriginal title. Most of the constitutional law teachers cover aboriginal title, so you are getting this aspect of aboriginal rights from two different perspectives. This actually makes sense; aboriginal title is part of the Canadian law of property, and indeed it is a common law concept, not a constitutional one, in its origins. *Calder*, the first case we will read and which in the modern era established that there was such a thing as aboriginal title, predates the passage of section 35 of the *Constitution Act*. And, as that case explains, the idea that the common law recognises an aboriginal title is a very old one.

Having said that, since 1982 aboriginal rights, including aboriginal title, have been entrenched in section 35 of the Constitution. As a result, aboriginal title has become a constitutional issue as well as a matter of property law. The leading Supreme Court of Canada case on aboriginal title, *Delgamuukw*, brings together the common law of aboriginal title and the constitution.

Reference has been made above to both aboriginal title and aboriginal rights. The former is seen as one form of the latter. According to the Supreme Court of Canada in *R.* v. *Van der Peet*, it represents 'the way in which the common law recognizes aboriginal land rights.' The court also stated: 'aboriginal rights and aboriginal title are related concepts; aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land.' In this definition, therefore, 'aboriginal rights' is a general term, and 'aboriginal title' is a specific instance of an aboriginal right. However, in some cases 'aboriginal rights' is, confusingly, also a term that refers to specific land use rights, less than title - for example, a right to hunt.

HISTORICAL BACKGROUND TO THE CALDER CASE

In *Calder* v. *Attorney-General of British Columbia*, the SCC held that there was such a thing as indigenous title *at common law* - that is, outside any constitutional context. It is a right arising out of indigenous peoples' historic occupation of their lands at the time that the relevant parts of what is now Canada came under British sovereignty. It was the first time that the SCC had clearly said this. But it was not the first time that Anglo-Canadian law had recognised indigenous title. As the court says in *Calder*, numerous treaties were made between the crown and indigenous groups in the nineteenth century which recognised indigenous title. They recognised it while extinguishing it, but they still recognised it. These were treaties covering the prairies (the so-called numbered treaties) after Canada acquired all the Hudson's Bay Company (HBC) territories. There were also treaties covering most of what is now Ontario, in the later eighteenth and the first half of the nineteenth century.

British Columbia's history in this regard is different from any other western province. From the

1850s until 1973, the *Calder* case, the province refused to recognise indigenous title. This is why so many of the indigenous title cases are from British Columbia.

A little bit of additional historical background is useful for *Calder*. Until 1846 the area we now know of as the Pacific Northwest (British Columbia, Washington, Oregon, and Idaho) was disputed territory between Britain and the United States. That dispute was resolved by the Oregon Boundary Treaty of 1846, and from that date British sovereignty was established over what is now British Columbia. Three years later, in 1849, the colony of Vancouver Island was founded. Britain gave the HBC control over land settlement, and James Douglas, the HBC's principal employee in the region, was made Governor. Between 1850 and 1854 Douglas made 14 treaties with indigenous groups, ceding indigenous title, but covering only a small part of Vancouver Island. He did this pursuant to British instructions. In 1858 the mainland became the colony of British Columbia, twelve years after sovereignty. Douglas was made Governor of this colony also. His instructions again talked about treaties and Indian title, but he made none. Instead he did what successor governments did - unilaterally laid out small reserves. In 1866 the two colonies were united as British Columbia.

From the 1860s successive colonial governments consistently denied that the claims of British Columbia's indigenous peoples to their traditional territories had any legal validity. The Legislature banned pre-emption (the taking up of land grants in fee simple) by indigenous peoples; they were to be confined to reserves. In 1871 British Columbia joined Confederation. Article 13 of the Terms of Union said that BC should provide land to the federal government for reserves in the same way and to the same extent as the colonial government had done. From the 1870s land was granted to European settlers, and Indigenous people continued to be put on reserves. The province did transfer land to Ottawa in trust as Indian reserves, and in 1876 the two governments established a joint commission to allot the reserves. There were ongoing disputes about the size of reserves. In the 1870s also indigenous people were disenfranchised. In 1899 Treaty 8 was signed, covering that part of BC, in the north east, that is east of the Rockies, as well as the area north of BC to the 60th parallel.

The late nineteenth and early twentieth centuries saw the first campaign for indigenous title in BC: see the statement in Calder that `the Nishga tribe has persevered for almost a century in asserting an interest in the lands.' It failed, and in 1927 a Joint Committee of the Senate and Commons concluded that no claim for Indigenous title had been established, and `the matter should now be regarded as finally closed`. There followed a 1927 amendment to the *Indian Act* which made it illegal to raise money to pursue Indian land claims without the written consent of the Superintendent-general of Indians. This was repealed in 1951. The second campaign for recognition of indigenous title began in the 1960s and the *Calder* case was the result.

INDIGENOUS TITLE AND THE CONSTITUTION

The principal case we will read in the Constitutional Law Casebook *is Delgamuukw*, a very important case. It deals both with the content of indigenous title and with how indigenous title fits into section 35 of the Constitution, which came into effect after *Calder*. Section 35 'recognises and affirms' aboriginal rights (the text of s. 35 (1) appears on p. 536 of the constitutional law casebook). Aboriginal title, which was established before 1982, is one of the aboriginal rights protected by s. 35.

While we are principally interested in *Delgamukkw* for what it says about aboriginal title, and while in many respects it builds on *Calder*, the fact that s. 35 was enacted between the two cases means that understanding *Delgamuukw* requires an understanding of the landmark SCC cases on s. 35 and aboriginal rights generally, which were decided before *Delgamuukw*. These cases have or will be studied in your constitutional law course, but to make sure you fully understand *Delgamuukw* I will summarise them here. It is a necessarily brief and superficial summary, but it will do for the purposes of the Property course.

The first of these cases was *R. v. Sparrow*, decided in 1990. Sparrow was not an aboriginal title case, but one involving a claim of a right to fish in a section of the Fraser River. The court more or less assumed that there was an aboriginal right, and thus did not discuss the test for establishing one. The importance of the judgment lies in two other areas.

First, as to which rights were protected under s. 35, the court held that only 'existing' rights were protected, that is, those existing in 1982. Thus a right that had existed some time in the past but which had been extinguished before 1982 was not protected. In turn that finding made the definition of extinguishment important. The court held that regulation, even very extensive regulation, of a right did not amount to its extinction. For extinguishment to take place the intention of the crown to do so must be 'clear and plain.' As we will see, this was the test first enunciated in *Calder*.

Second, the court held that the fact that aboriginal rights were 'recognised and affirmed' by s. 35 did not mean that they could not in future be regulated. Federal legislative power derived from s. 91 continues. But the ability of governments to infringe on aboriginal rights was guided by the crown's fiduciary duty towards aboriginal peoples. The court said: "the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial." Thus the court extended the notion of a fiduciary duty towards aboriginals from the particular context of surrender of reserve land (*Guerin*) to the entire relationship between the crown and aboriginal peoples. The consequence of this is that governments must justify any regulations which infringe on or deny aboriginal rights.

Third, the court laid out the basic elements of any justificatory scheme. It sounds like section 1 of the Charter, but it is not, because s. 35 is not in the Charter. The first element is that the government must show that a regulation has been enacted 'according to a valid objective.' In *Sparrow* itself the court said that conservation of the resource would be one, but rejected 'the public interest' as a valid objective; it was "vague" and "so broad as to be unworkable as a test for the justification of a limitation on constitutional rights."

Assuming that the government could provide a valid objective, the second element was the need for the regulation to be in accord with the government's fiduciary duty. In the case of restrictive fishing licences, the issue in *Sparrow*, this meant that 'top priority' must be given to Indian food fishing in allocating the resource after total catch limits had been set to ensure conservation. If Indian food fishing needs took up all the available catch, then so be it. There were other factors to consider as well when considering whether the fiduciary duty had been met, but they would vary according to the context in which the right was asserted.

In a subsequent case, *R. Gladstone*, the SCC altered the content of this justificatory scheme, although not its general framework. *Gladstone* involved a successful claim that the aboriginal group in question had a right to fish commercially, not just for food or for ceremonial purposes. It was therefore a right without an "inherent limitation;" potentially aboriginal fishers would be entitled to the entire catch to satisfy their aboriginal right if the market was large enough. As the right was enlarged to a commercial fishery, the acceptable government objectives were broadened to include not just conservation but a much broader set of objectives - 'the pursuit of regional and economic fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups.' At the same time the content of the fiduciary duty was also altered. Giving aboriginal fishing priority would be to give it exclusivity when the right had no internal limitation, and this was wrong. Instead aboriginals were to be given a preferred place in allocation: 'the Government must demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the resource by other users.'

Both of these elements of the justification test - objective and fiduciary duty - are discussed in *Delgamuukw*. There the aboriginal right is aboriginal title, an even 'larger' right than the commercial fishery in *Gladstone*. Yet again the SCC altered both aspects of the justification test: see pp. 582-583.

The other significant case decided before *Delgamuukw* was *R.v. Van der Peet*. In this case the court laid down the test for deciding whether a particular practice was an aboriginal right. Parts of what the court said there are relevant to your reading of *Delgamuukw*.

First, it held that 'in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right'.

Second, it said that the time to assess whether a practice met this test was as of first contact with Europeans.

Third, it held that aboriginal rights claims must be adjudicated on specific basis, not in general. A practice might meet the test for one group, the same practice might not do so for another.

Each of these three issues is discussed in *Delgamuukw*. First, as you will see, the court rejected the 'integral to a distinctive culture' test for aboriginal title. Aboriginal title is more than this, it is a right in the land itself, arising from historic occupation, yet it is not a full fee simple: see pp. 575-

577.

Second, in defining what aboriginal title is, the court gave a general definition, not one specific to any particular society: see the same section.

Third, the test for aboriginal title is occupation at the time of British sovereignty, not contact between aboriginal peoples and Europeans: see pp. 579-580.

Delgamuukw does not say much about what occupation means, but as students of property law you know that legal tests are often easy to state but applying them is made difficult by the need to define terms in context. So it is easy to say that the test for aboriginal title is occupation at the time of British sovereignty, but harder to define 'occupation' for these purposes. That is what the *Tsilhqot'in Nation* case, our last case, is about. Note the references to comparing occupation of aboriginal groups to the standard needed to establish possession in the law of adverse possession.

CHAPTER 10

LANDLORD AND TENANT LAW - COMMERCIAL

INTRODUCTION TO THE LEASEHOLD

The principal characteristic of the landlord-tenant relationship at common law is that the leasehold interest is conceived of as an estate in land. While the relationship of landlord and tenant is created by contract, the relationship itself is not a contractual but a property relationship. In this sense it is the same as the relationship between a buyer and seller of land; they may contract to buy and sell, but once they have done so they are not in a continual contractual relationship that may modified by negotiation or even breached. The buyer has an estate and can exclude the seller; dealings between the two are at an end.

So too in the classical conception of the leasehold estate. Once the tenant has the lease he or she has an estate and the absolute right to exclusive possession against all the world, including the landlord, for so long as the term of the lease provides. All the landlord has is the reversion - the right to retake possession and full rights when the tenant's estate is at an end.

The landlord-tenant relationship is thus a relationship created by contract, express or implied, in which a person with an interest in real property - the landlord or lessor - grants a lesser interest in that property to the tenant or lessee. The technical term for lease is demise, and the leased land is often referred to as the "demised premises". The lesser interest demised is that of exclusive possession of land for a definite or potentially definite period of time. A leasehold estate cannot be of uncertain duration.

The next three sections expand on the point that a lease confers an estate in land, not merely certain contractual rights and obligations, by examining the distinction between leases and licences, the doctrine of the independence of covenants, and the legal consequences that flow from physical abandonment of the demised premises by the tenant.

LEASES AND LICENCES

It is one thing to say that a lease is the grant of a leasehold estate, but knowing that will not tell you whether a particular agreement constitutes a lease or some other arrangement between the parties over use of land. The most common "other" legal form to an alleged lease is a licence, which is simply permission to use land for some purpose. If you let somebody park in your driveway, for example, you have granted them only a licence. Knowing which of the two has been created in any agreement is often vital, for at common law a licence is revocable at any time by the licensor. [Equity will enforce a contractual licence, one in which consideration has been paid, but even then it is effectively revocable provided damages are paid.]

An obvious example of an agreement that could be a lease or a licence, and of the importance that flows from deciding which is involved, comes from thinking of a superintendent in an apartment building. He or she works for the owner and usually lives in one of the apartments. If the agreement to occupy the apartment was construed as being only a licence, as but one term of many in the contract of employment and given in order to make it easier to carry out the terms of employment, the superintendent would have no legal protection outside any terms contained in the licence, the contract. If the same agreement to occupy was seen as a lease, and therefore completely independent of the employment relationship, the superintendent could claim whatever protection the jurisdiction's legal regime chose to give to tenants, whether or not he or she continued to work for the owner. As it happens, this situation is largely covered by a provision of the Residential Tenancies Act in Ontario, but the example should help to point up the significance of the lease/licence distinction.

However, stating which consequences flow from whether an agreement for the occupation of land is a lease or a licence is easier than deciding whether that agreement is a lease or a licence. Indeed, this can be quite a difficult question. If an agreement is uncertain as to duration, it will be a licence. But certainty of duration is only a necessary, not a sufficient condition, for a lease. Beyond that, the cases reveal two approaches to deciding whether a particular agreement is a lease. One line of cases states that if the agreement grants, or intends to grant, exclusive possession for a fixed time it is a lease. That is, the only thing that matters is whether the right to exclusive possession has been granted. If it has, the agreement is a lease and grants an estate, whether or not it uses the word licence 100 times. Another, more recent, line of cases suggests that it is the intention of the parties that matters; if they intend to be landlord and tenant, then the court will give effect to that intention. Thus a document that looks like a licence can be held to be a lease because of its language, so that exclusive possession is granted to the lessee irrespective of what the document says. Conversely, by this approach a document that grants exclusive possession for a term can be held to be a licence because the parties call it a licence.

The *MetroMatic* case below illustrates this latter approach, which is the one preminently used by the courts. Note that the 'lease' contains a variety of clauses relating to matters beyond the simple question of the right to occupy the land. These terms are called covenants in a lease, the equivalent of 'contractual terms' in other kinds of agreements. Such covenants seem to limit the tenant's rights of exclusive possession, and one might be tempted to say that any such limit means that exclusive possession has not been granted. Alternatively and conversely (or perhaps perversely) one might say that such limits are the work of the tenant, and therefore an exercise of his or her right of exclusive possession.

THE INDEPENDENCE OF COVENANTS

One of the incidents of the landlord-tenant relationship being a property relationship is the doctrine known as "the independence of covenants". Covenants are terms in the lease in addition to the grant of the estate itself by which either or (usually) both parties agree to undertake certain duties - the landlord might provide heat, for example, or agree to trim a hedge, while the tenant would agree to pay rent or repair wear and tear. To say that covenants are "independent" at common law means that failure by either party to perform an obligation does not give a right to the other to terminate the lease. That is, performance of an ancillary obligation is independent of the duty to perform corresponding ones and/or the principal one. As McDonald C.J.B.C. put it in *Falleson* v. *Spruce Creek Mining Co*, [1942] 4 D.L.R. 708 (B.C.C.A.): "a lessor cannot re-enter for mere breach of covenant". However, he also noted that if re-entry for that particular breach was made "an express term in the lease", the lessor could do so. That is, if the lease was made conditional on the performance of that particular ancillary obligation then breach of the obligation would enable the landlord to end it. This is not an exception to the independence of covenants, but an application of the notion, seen already in chapter three, that estates may be conditional.

Laskin, *Cases and Notes on Land Law*, puts it this way: "Where a bargain is made for the lease of premises ... on terms embodied in a formal document of lease, the lessee (at least on entry) acquires an estate which he holds subject to those terms. The pertinent question is to what extent is the transaction regarded as the transfer of an interest in land (and hence governed by rules and doctrines developed as part of the law of estates) and to what extent is it regarded as a business dealing (and hence governed by rules and doctrines developed later as part of the law of contracts).... Where the relationship was still that of lessor and lessee (before entry into possession) the common law tended to emphasize the contractual aspect of the bargain.... Once, however, tenure was established, whether in pursuance of a formal lease or of an agreement for a lease, property conceptions dominated. This was particularly true in respect of the covenants of the respective parties. Apart from express provision on the matter, the contract rule of dependency of promises was ignored. Thus, the tenant was not entitled to be excused from further performance or to terminate his lease unless there was a breach of condition by the landlord rather than a mere breach of covenant."

In recent years there has been some undermining of this notion, a matter to which we will return.

FROM PROPERTY TO CONTRACT? ABANDONMENT

There are a variety of ways by which a leasehold relationship can be ended, one of which is known as "surrender". Using an old definition, this is "the yielding or delivering up of lands or tenements and the estate a man has therein, unto another that has a higher and greater estate". "Surrender" cannot be unilateral, it is not brought about merely by the tenant quitting the premises, an action we should call "abandonment". If the tenant obtains the landlord's agreement (express or implied) to his or her leaving, such agreement converts mere abandonment into surrender.

What if the tenant wants to surrender half way through a one-year lease and the landlord does not? Putting aside any issues relating to specific performance, apply to this problem what you have learned in contract law. You would tell the tenant that he or she is probably best to just get out and hope that the landlord, who has a duty to mitigate damages, will find somebody else to rent the premises at the same or a reduced rent. Your client would be liable for damages for breach, but they might not be that heavy, being only the difference between what you would have paid and what the landlord can get somebody else to pay. Conversely, you would probably advise the landlord that he or she cannot make the tenant stay, that the best thing to do is to secure the premises and try to find another tenant knowing that you can sue the defaulting tenant for any shortfall.

But, as we have seen, a lease is not a contract, it is an estate. And according to classical principles that means that if it is granted for twelve months it lasts for twelve months, unless surrendered, in which case it is absolutely at an end with no future obligations on either side. So, according to this classical property law analysis of the problem, as laid out in *Goldhar* below, you would have to tell the tenant something different. You would have to say that whether or not he or she physically abandons the premises the lease subsists for 12 months and he or she is liable for the whole term. The landlord has no duty to mitigate damages. But hopefully the landlord will do something foolish like re-enter and change the locks, in which case he or she will be considered to have accepted that a surrender has taken place and your client will have no liability left at all. So it's all or nothing for the tenant. Conversely, if advising the other side, you would caution the landlord that finding another tenant would be interpreted as a surrender and no rent could be got from the defaulting tenant. If the landlord wanted to get such rent, he or she would have to leave the premises unoccupied. Moreover, the landlord cannot sue for the whole of the term's rent when the tenant decamps after 6 months but must wait until it becomes due and is not paid (assume it's due monthly).

All of this is explained in *Goldhar*. Both that case and *Highway Properties*, which follows it, also show that there are some wrinkles in the traditional position and that factual considerations relating to such matters as whether, and if so when, the landlord accepted the abandonment and therefore brought about a surrender can be very important. As you read *Goldhar*, think about why the traditional position reinforces the principal lesson of this chapter - that the lease is a property relationship. You will also see that *Highway Properties* alters the traditional law: given the result in that case, how would you answer the question contained in the first clause of the heading to this section?

A TENANT'S OBLIGATION TO PAY RENT AND LANDLORD REMEDIES

Rent is not a requirement of the leasehold relationship, and therefore there was no implied obligation to pay it at common law. But if it is included in the lease, and of course that is invariably the case, then the common law imposed an obligation to pay. If rent is included in a lease the obligation to pay it is now a statutory condition: see Ontario's *Commercial Tenancies Act*, s. 18 (1), below.

If the tenant fails to pay rent the landlord has a number of options. First, he or she can choose to end the lease - called a forfeit of the lease. This may be done either by a physical re-entry by the landlord, or through an action for possession. In either case the landlord may also, and obviously usually would, sue for rent due.

At common law the right to forfeit could be exercised as soon as the tenant failed to pay rent, but under the statute the tenant has 15 days to pay. See Commercial Tenancies Act, R.S.O. 1990, c. L-7, s. 18, which both makes the payment of rent a statutory condition, not an independent covenant, and gives the tenant 15 days before the condition becomes operative.

18 (1): Every demise, whether by parol or in writing and whenever made, unless it is otherwise agreed, shall be deemed to include an agreement that if the rent reserved, or any part thereof, remains unpaid for fifteen days after any of the days on which it ought to have been paid, although no formal demand thereof has been made, it is lawful for the landlord at any time thereafter to reenter into and upon the demised premises or any part thereof in the name of the whole and to have again, repossess and enjoy the same as of the landlord's former estate.

Note that s. 18(1) says 'unless it is otherwise agreed.' Many commercial leases do indeed include a provision shortening the 15-day grace period. Such provisions also typically require the landlord to give notice of the default and of its intention to terminate as a result.

A landlord has another remedy to use for unpaid rent, one unique to it among all "creditors". The landlord may levy distress on the tenant - seize the tenant's goods which are on the demised premises and sell them to meet the rent due. However, distress is a remedy which flows only from the existence of the landlord-tenant relationship, and therefore it requires that relationship to continue. That is, the landlord generally cannot both forfeit the lease and take distress. The only exception to this principle comes in s. 41 of the *Commercial Tenancies Act*, reproduced below

Distress is an ancient remedy, and an unusual one. Ziff calls it a "powerful remedy" and a "relic of feudalism": *Principles of Property Law*, 4th edition, p. 283. It allows the landlord to summarily take the tenant's goods that are found on the demised premises and sell them to meet the rent arrears. Creditors generally must use the courts to enforce debts. There are limits on the kinds of property that can be taken, limits defined both by the common law and by statute. The *Commercial Tenancies Act* also contains a variety of other provisions regulating distress, some of which are reproduced here:

CHAPTER 11

LANDLORD AND TENANT LAW - RESIDENTIAL TENANCIES

INTRODUCTION

Since c. 1970 all Canadian jurisdictions have enacted separate statutory regimes for residential, as opposed to commercial, tenancies. These regimes vary from province to province. That of Ontario is now to be found in the *Residential Tenancies Act*, S.O. 2006, c. 17, portions of which are reproduced at the end of this chapter. The *Residential Tenancies Act* has been amended a few times since 2006, most notably by *An Act to amend the Residential Tenancies Act*, S.O. 2017, c. 13, otherwise known as the *Rental Fairness Act*. The predecessor to the *Residential Tenancies Act* was the *Tenant Protection Act*, brought in by the Harris conservative government in 1997, and the predecessor to that was the *Landlord and Tenant Act, Part IV*. I give all these names because the cases refer to them, depending on when a case was decided. Despite the name changes of the statutes, the content of individual sections did not change much.

Residential tenancies statutes deal principally with the legal rights and obligations of landlords and tenants. But they, or in some cases separate legislation, deal also with the *economics* of the relationship and with procedural matters. Re the former, Ontario and many, but not all, other provinces have long had some form of rent control, more properly called rent review because most schemes provide for a gradual increase in rent over time. Ontario has had two forms of rent review. Before the passage of the *Tenant Protection Act* in the 1990s the rent was attached to the apartment. Rent review was maintained in the *Tenant Protection Act*, but for sitting tenants only. New tenants were no longer protected. In other words, the system was changed from one in which the rent for the premises was controlled, to one in which the rent for a tenant is controlled so long as he or she resides in the premises. This system is sometimes known as "vacancy decontrol" - on a vacancy the rent is 'decontrolled'. The same system was maintained by the previous Liberal government and is in place today. As s. 113 of the *Residential Tenancies Act* states: "the lawful rent for the first rental period for a new tenant under a new tenancy agreement is the rent first charged to the tenant."

Another significant change has been made to the procedures for adjudicating residential tenancy disputes. Under the *Landlord and Tenant Act Part IV* landlord-tenant matters were dealt with by the superior courts, as were and are commercial tenancy disputes. When the *Tenant Protection Act* was introduced the government also established an administrative tribunal (an inferior court limited in jurisdiction to matters given to it by statute) to handle residential landlord-tenant matters. It was called the Ontario Rental Housing Tribunal. When the current *Residential Tenancies Act* came in the tribunal system was retained, but its name was changed and it is now called the Landlord and Tenant Board. Decisions of the Board can be reviewed (reconsidered on questions of law) in the Divisional Court.

Residential tenancies law can obviously be set against the general background of some of the

themes of this course - particularly the ideas that property is a bundle of rights and that the content of property regimes and the arguments supporting one or the other are matters of social choice and change over time. The legal reforms first introduced in the 1970s by the *Landlord and Tenant Act Part IV* have remained largely unaltered since then. However there have been changes to the rent control scheme, as noted above.

The general thrust of the various legislative changes begun in the 1970s has been to make the conceptual basis of residential tenancies law different from that of commercial tenancies in two fundamental ways.

First, while the commercial lease is still an estate, the residential lease is a contract for accommodation. The *Residential Tenancies Act* as a whole is underpinned by this idea, but we can also point to particular sections as shifting the conceptual basis from estate to contract law. Some sections introduce contractual doctrines (s. 16 mitigation; s. 17 interdependence of covenants; and s. 19 frustration). The interdependence of covenants section has less significance than it might seem to have, because the termination sections, discussed below, provide a complete code for when a tenancy can be terminated by the landlord. But it does operate to permit the tenant to withhold rent where a landlord is in serious breach of its obligations. Tenants have been able to take advantage of it, for example, where the unit was full of cockroaches or where the hydro was cut off because the landlord did not pay the bill.

Other "contractualisation" provisions include section 40, which abolishes distress. In addition, section 3, the application section, refers to "rental units in residential complexes", not to leases or demised premises or the like. The lease-licence distinction is also done away with by the definition of "rental unit" as including "a room in a boarding house, rooming house or lodging house and a unit in a care home."

Second, while the terms of the commercial lease are largely a matter for the parties to negotiate, a residential contract for accommodation is in significant ways a regulated contract; the power of the parties to make their own terms is substantially curtailed. This second point is somewhat less true of the current Ontario legislation than it was of the pre-1997 regime, in that the rent control regime has been changed. But it remains the case that the legislation in many other areas takes away the ability of the parties to bargain and substitutes imposed terms. One example of this second theme is the repair and fitness for use provision (s. 20). This changes the common law, which put the repair obligation on the tenant unless the parties bargained otherwise. It requires the landlord to both provide and maintain premises in good condition.

Underpinning this second theme is the idea that there is an inequality of bargaining power between residential landlords and tenants. The market, and thus the common law which both derives from laissez-faire and advances it, was considered an inappropriate form of ordering, because truly free bargaining did not take place. The consequences of this idea about the inequality of bargaining power include the prohibition of "contracting out" (s. 3), the elimination of landlords' "self-help" remedies (ss. 21, 25 , 39 and 40), the prohibition of "no-pet" clauses (s. 14) and statutory security of tenure (see ss. 37 *et seq*, and this chapter).

Note also that in various ways the Act seeks to ensure that tenants understand their rights. On occasion this is done by attempts to use plainer language than is used for common law concepts (see the mitigation section, s. 16, for example, as well as s. 40), which does not refer to distress while abolishing it. At other times it is done by imposing requirements on the landlord to provide the tenant with information about his or her rights. See in particular sections 11 and 12. Obviously this reflects the fact that residential tenancy law is an area that often affects the poorest members of society.

The various acts specifically about residential tenancies are not the only statutes that govern the area. Other statutes directly relevant include the *Human Rights Code* which prohibits discrimination in the provision of accommodation. The *Code* has also in recent years affected the operation of some of the termination (eviction) provisions, as discussed below.

SECURITY OF TENURE

The major change in residential tenancies law in Ontario has been the introduction of security of tenure. The statutory sections are 37 – 39; section 38 is the key section. They are not as clear as they could be, but what they say is that in Ontario the tenant has substantial, though by no means complete, security of tenure. The tenant is not obliged to leave merely because the tenancy agreement expires; rather, the agreement is deemed to continue on a month to month basis. The right of the tenant to occupy is thus separated from the tenancy agreement (note that the word lease is not used, it's called a tenancy agreement, part of the move away from estate to contractual ideas and language.)

The tenant's security is not absolute. He or she may be obliged to leave for certain reasons, dealt with in the sections below entitled "Termination of Tenancies: Landlords' Rights" and "Termination of Tenancies: Tenant Fault".

There is some security of tenure greater than that given by the common law in most Canadian jurisdictions, though its extent varies.

Security of tenure, and the other legislative reforms of the 1970s in Ontario, represent a substantial shift of strands in the bundle of rights from landlord to tenant. This was effected because of a societal consensus that an apartment was a home even if its occupier did not own it, and that the law ought to provide protections to the home above and beyond what the market and the common law could provide.

At the same time that security of tenure was introduced, a similar consensus formed around the idea that there ought to be minimum basic standards in housing; hence the fitness for use and repair provisions, for example, which can be seen as a form of consumer protection legislation.

TERMINATION OF TENANCIES: LANDLORDS' RIGHTS

The *Residential Tenancies Act* regulates the relations between landlords and tenants. But it does not require property owners to be landlords, and thus one set of reasons for termination acknowledges that property owners can make choices about the use of their property. Sections 48 (personal occupation by the landlord or close family member) and 49 (personal occupation by a purchaser of the building) and 50 (non-residential uses and/or extensive renovations) can be so categorised. Of these the principal one is s. 48. Note that these sections can only lead to termination at the end of the tenancy agreement, and require substantial notice to the tenant. They also give the tenant a right of early termination and, under ss. 52 and 54, require compensation in some cases.

The *Act* restricts the types of buildings that sections 48 and 49 apply to in some circumstances. Section 72 (2) deals with situations where there are co-owners of a building. In that circumstance no one individual is the landlord, all are, and thus no one individual could invoke s. 48. Co-owners at one point tried to get around this, by executing an agreement amongst them which gave each individual co-owner the right to occupy a particular apartment. Not surprisingly this was sometimes abused to get rid of unwanted tenants. Section 72 implicitly allows the individual co-owner to be the landlord for a s. 48 application if there is such an agreement among co-owners, but restricts the operation of the section in two ways. It states that the Board must refuse the application unless:

a) the building contains no more than four units, or
b) one or more of the permitted class (landlord, spouse etc) "has previously been a genuine occupant of the premises."

It might be assumed that a corporation, although a legal person and often the landlord, cannot be a landlord for the purpose of s. 48, which requires that the 'landlord' or spouse etc 'personally occupy' the vacated premises. In fact in two circumstances a corporation can avail itself of the provision. In *Edward Slapsys c/o 1406393 Ontario Inc* v. *Abrams* [2010] OJ No. 4452 the Court of Appeal confirmed that the sole shareholder of a corporation could invoke the section for personal use even though title to the building was in the corporate name. And in the recent case of *York Region Condominium Corp No 639* v. *Lee* [2013] OJ No. 647 the Divisional Court allowed a condominium corporation to do so. A building of c. 150 units was almost entirely occupied by individual unit owners. One unit was owned by the condominium corporation, along with other common areas of the building. Until 2007 this unit was occupied by the building superintendent, obviously an employee of the corporation. In 2007 the corporation switched to using an off-site superintendent, and rented out the unit to a tenant. In 2012 it decided to again use an on-site superintendent and the corporation applied to have the apartment vacated for its personal use. A member of the Landlord and Tenant Board held that a corporation could not personally occupy an apartment, and refused the application. The Divisional Court stated that as a general matter a corporation could 'occupy' any piece of real estate through its officers, employees etc. , and 'must surely be able to occupy a rental unit for the purpose of residential occupation incidental to its status as a landlord.' Thus: 'when a corporation that is the landlord of a building occupies a rental unit for the purpose of engaging and requiring one or more natural persons to reside in the unit

security of tenure.

Non-Payment of Rent

Not surprisingly non-payment of rent is the most common cause for termination. Section 59 (1), gives the landlord the right to terminate the tenancy with 14 days notice. Note that section 59 (2), states that if the tenant pays before the notice period expires the notice to terminate is automatically void. Hence, in effect, the tenant has 14 days to pay. Similarly to commercial tenancies, the idea here is that the tenant's investment in the premises, in this case a home, overrides the landlord's interest in getting the rent on time. Since the landlord's interest in rent is an economic one, it is secondary to the tenant's security, so long as payment is ultimately forthcoming.

There are many other ways for the tenant to avoid termination even after the 14-day period has expired. One is in s. 59 (3), which voids the notice if the tenant pays before the landlord applies to the Board for an order terminating the tenancy. Per s. 74 (1), a landlord cannot make that application "before the day following the termination date specified in the notice."

Section 74 (2), provides another point along the path to eviction for the tenant to avoid eviction - paying before the Board issues an eviction order, that is, between when the landlord applies to the Board and when the hearing is held. At this stage the tenant must also pay the landlord's application fee.

A further chance to make good is in s. 74 (3) and (4), which voids an eviction order if rent owed (and now costs as well) is paid before the eviction notice becomes effective.

The purpose of these provisions is obviously to give the tenant as much time as possible to pay and avoid eviction. Even if a tenant is unable to pay at any of these stages, he or she may still apply for relief from eviction, a matter discussed in a later section.

Illegality

Section 61 is the illegality section. It contains an important change from both of the previous Acts. It states that a tenant can be evicted if either the tenant or another occupant of the rental unit commits an illegal act. Prior to 2006 it was only possible to evict a tenant for the actions of another occupant if one could also establish that the tenant had permitted the illegal act. Under the current legislation the landlord need only show that the tenant 'permitted' the illegal act if it was actually done by some third party, not an occupant. Some 'occupant' cases involve room-mates, but most involve adult children.

Note that, per s. 75, it is not necessary for the tenant or occupant to have been convicted criminally of an illegal act to invoke this section. Indeed they need not even have been charged, although as a practical matter a charge is a good source of evidence for the landlord. In *Toronto Community Housing Corp* v. *Norton* [2006] O.J. No. 2711 (Div. Ct.) the tribunal found that an illegal act had

been committed even though the criminal charge was withdrawn.

In addition, the landlord need not prove the illegality on the beyond a reasonable doubt standard. This is a general common law rule - where a finding of criminal activity is needed to trigger a civil consequence, only the civil standard is required on the threshold question of the criminal act. It has not always been the case. Until 2008 courts applied a variety of standards in between reasonable doubt and balance of probabilities where criminal conduct was an issue in a civil proceeding. This included eviction for illegal act cases: see in particular *Bogey Construction Ltd* v. *Boileau* [2002] O.J. No 1575 (Div. Ct.). However, the Supreme Court overruled all such decisions in *F.H.* v. *MacDougall,* [2008] S.C.J. No. 54. It stated: "I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof." This is not to say that the legislature cannot choose to impose a higher standard. The Ontario *Police Services Act*, for example, requires misconduct to be proved against a police officer on "clear and convincing evidence."

The courts have put an additional gloss on the meaning of "illegal act" in this section. The act need not be a *Criminal Code* offence, it can be any contravention of a statute, including the *Residential Tenancies Act*. However, the offence must be a serious rather than a trivial or technical one, and, most importantly, it must have the potential to affect the character of the premises or disturb the reasonable enjoyment of the premises by the landlord or other tenants: see *Samuel Property Management Ltd.* v. *Nicholson* [2002] O.J. No 3571 (C.A.), confirming a number of prior decisions of the Divisional Court. This illustrates a point made at the beginning of this section - a tenant is not to be evicted because he or she does something wrong, but only if the transgression has some relevance to the landlord, either harming the landlord's reputation or his or her economic interests.

Many of the cases on what is now s. 61 involve drugs, and in those cases the courts usually terminate tenancies as a result, especially if trafficking is involved. Indeed note the different notice periods for production/trafficking in drugs offences than for all other offences.

Because illegal acts are considered more serious than non-payment of rent or causing damage or interfering with the enjoyment of other tenants (below), there is no "make good" provision as there is for sections 59, 62 and 64. Moreover, per s. 71, a landlord can apply to the Board for eviction immediately on issuance of the notice to the tenant; he or she need not wait until after the notice period expires, as is the case with s. 59.

Damage

Section 62, p. 486, is straightforward - a tenant can be evicted if the tenant, or another occupant of the rental unit, or a person whom the tenant permits to be in the unit, causes undue damage. Note that as with non-payment of rent there is a "make good" provision which voids the application if it is complied with. A landlord cannot apply to the Board for an eviction order during the 7-day remedy period, but may do so immediately afterwards: see ss. 70 and 71.

Interference with Reasonable Enjoyment

Section 64, allows eviction for "substantial" interference with the reasonable enjoyment of the premises by other tenants or by the landlord. As with s. 62, there is a requirement that the notice of termination specify the problem and give the tenant seven days to "make good", in which the case the notice becomes void. As with the undue damage cause, a landlord cannot apply to the Board for an eviction order during the 7-day remedy period, but may do so immediately afterwards: see ss. 70 and 71.

Section 64, and section 66 below, must be read in conjunction with s. 76, which, given the prohibition on "no-pet" clauses, defines what role an animal can play in a termination application.

It is difficult to be precise about what kinds of conduct represent a sufficient interference to invoke the section. Aggressive and /or noisy behaviour is often the problem, and there are many cases in which the finding has been that one has to put up with a certain amount of noise and disturbance in an apartment building, especially one containing lots of children. Indeed in one instance a tenant's over-sensitivity to noise, which resulted in frequent complaints, was held to be itself behaviour which interfered with other tenants! Other causes for complaint have included a failure to clean and smoking.

Section 64 really deals with problems between tenants, and that observation leads to two other ones. Firstly, it actually gives tenants a remedy against their tenant neighbours that non-tenants do not have. Non-tenants must use whatever other legal resources, if any, are open to them. The point is made by *Laing* v. *Brushette* [1996] O.J. No. 2732 (Gen. Div), in which the landlord, the owner of a condominium unit, sought to evict a tenant who disturbed the other residents of the building. But those other residents were owner-occupiers, not tenants, and the section, which refers to tenants and not neighbours, was not available to the landlord as a result.

Second, and also using the *Laing* example to make the general point about tenant fault made at the beginning of this section, s. 64 does not give a landlord the right to evict because a tenant behaves badly. It only gives him or her the right to do so only if that behaviour affects other tenants and by doing so affects the landlords' economic interests.

In recent years the *Human Rights Code*, particularly the prohibition of discrimination against those with mental disabilities, has had an impact on the use of s. 64, although usually in the context of whether relief from eviction should be granted: see the *Walmer Developments* case below.

Obviously the same kinds of problems that can invoke the operation of s. 64 can occur in other 'neighbour' contexts, with the closest being condominium buildings. The equivalent to eviction in such buildings is a forced sale, and this was ordered in one very unusual case, *The Owners Strata Plan LMS 2768* v. *Jordison and Jordison*, 2013 BCCA 484. The condominium by-laws included a provision that 'A resident or visitor must not use a strata lot, the common property or common assets in a way that, ... (c) unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot.' For years other residents complained of the Jordisons' 'obscene language and gestures, ... interference with the activities of others, ... spitting at other residents, [and] unacceptable loud and unnecessary noise.' They also ignored court orders to cease and desist. The governing legislation, the *Strata Property Act*, S.B.C. 1998, c. 43, s. 173, gave the courts powers to (a) order an owner, tenant or other person to perform a duty he or she is required to perform under this Act, the bylaws or the rules; (b) order an owner, tenant or other person to stop contravening this Act, the regulations, the bylaws or the rules; (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b). The British Columbia Court of Appeal held that (c) included the power to order the Jordisons to sell their unit. The Jordisons argued that such an order was an abrogation of their right to property and could only be made if the legislation expressly authorised it. The BCCA agreed that its order did take away property rights, but based their order on two factors. First, enforcement of the non-interference provision would be 'stymied' if only lesser measures (fines, injunctions) could be employed but were, as in this case, ignored. Second, this was a case involving competing property rights: 'The scheme of the Strata Property Act includes the property rights of other owners of the strata.... The ... private property interest [of the Jordisons] ... must yield to the rights and duties of the collective.... The old adage "a man's home is his castle" is subordinated by the exigencies of modern living in a condominium setting.'

Impairment of Safety

Section 66 allows eviction for an act or omission done in the residential complex which "seriously impairs" or "has seriously impaired" the safety of "any person." Note that there is no make good provision in s. 66, a relatively short notice period (10 days), and the act complained of does not have to impair the safety of another tenant or the landlord, but of "any person." This last aspect was brought in under the *Tenant Protection Act* and retained in the current Act; the old *Landlord and Tenant Act* required another tenant's safety to be impaired.

Acts found to have impaired safety include threatening behaviour (especially wielding a weapon), disconnecting smoke alarms, and starting fires. In one case the fact that other tenants subjectively felt intimidated by a tenant was held to be insufficient grounds; there must be objective evidence of actions/behaviour.

Picking up on the previous discussion about eviction and the *Human Rights Code*, in *Peel Living* v. *Gill* [2005] O.R.H.T.D. No. 6, a tenant who believed that voices in his head were telling him to burn down his apartment and kill himself by jumping from the balcony was evicted. The landlord had contacted the tenant's family, the Canadian Mental Health Association, and other agencies, but the tenant refused all help, declaring himself not to be mentally ill. The tribunal held that the duty